

After taking stipulations, there remained 13 issues for decision by the Administrative Law Judge. The Administrative Law Judge found claimant was not an employee and denied benefits. In the Award, the Administrative Law Judge also discusses and comments upon most, if not all, the other issues. The Administrative Law Judge also states in his Award that if claimant were an employee "[T]he other factors entitling the claimant to workers compensation benefits seem to be in place." The Kansas Workers Compensation Fund argues that the other discussion in the Award does not amount to findings or conclusions on the other issues. Claimant, on the other hand, argues that the Award does make all other necessary findings and does so in favor of claimant. Claimant, therefore, argues only for reversal of the conclusion that claimant was not an employee. The Kansas Workers Compensation Fund contends that claimant was not an employee and the Administrative Law Judge's conclusion on the issue should be affirmed. The

Workers Compensation Fund also argues that the record does not establish that the respondent had the \$10,000 payroll necessary to make the Kansas Workers Compensation Fund applicable.

The evidence establishes that Joseph Markus did not have workers compensation insurance coverage or the ability to pay benefits which might be awarded in this case. On appeal, the Workers Compensation Fund acknowledges that if benefits were awarded, the Fund would be liable for payment of those benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds and concludes as follows:

The Appeals Board finds that claimant was not an employee. Therefore, the decision by the Administrative Law Judge on this issue should be affirmed and benefits denied.

Claimant was injured on January 6, 1990, while dismantling an old asphalt plant. The plant was being dismantled for the purpose of the salvage value. The asphalt plant and the property on which it was located were owned by the VanLerberg family. The VanLerbeks had told the respondent, Joseph Markus, that he could have the salvage of the material in the plant if he would tear the plant down.

The Appeals Board agrees with the conclusion by the Administrative Law Judge that claimant was one of three joint ventures in the project to dismantle the asphalt plant and was not an employee of respondent Joseph Markus. A primary factor in determining employment relationship is the right to control. One may be an independent contractor if the control goes only to the result of the work and is not the means by which it is accomplished. Evans v. Board of Education of Hays, 178 Kan. 275, 284 P.2d 1068 (1955).

The evidence establishes that three individuals, Joseph Markus, Jerry Roland and the claimant each had different jobs to perform in connection with dismantling the plant. Markus had an agreement with VanLerberg which allowed Markus to dismantle the plant and sell the metal. Jerry Roland was to haul the metal. Claimant was responsible for tearing down the plant. Roland and claimant were each to receive 25 percent of the profits with the remainder to go to Markus. None of the individuals was to be paid a wage, no W-2 Forms were issued and no Social Security taxes were paid. Claimant would receive nothing if there were no profit.

Claimant points to control which Markus had as a result of his right to sell the salvage material. The evidence does not, however, establish that Markus had the right to control the manner or method in which claimant performed his work. In fact, the record suggests that he was left at the job site in the morning and picked up in the evening. Claimant furnished cutting torches and a one-ton truck used on the project. The evidence also indicates that this was a one-time project, not an ongoing working relationship between claimant and Mr. Markus.

On the basis of these factors, the Appeals Board agrees with and affirms the conclusion by the Administrative Law Judge that claimant was not an employee of Joseph Markus at the time of his injury.

The Appeals Board also finds that claimant has not met his burden of establishing that respondent Joseph Markus had the \$10,000 payroll required to meet the jurisdictional pay requisite specified in K.S.A. 44-505 for application of the Kansas Workers Compensation Act. Claimant attempts to establish such a payroll by projections regarding

the amount of money both claimant and Mr. Roland might earn from this project. Claimant relies upon Exhibit 12-A, a document which makes calculations regarding the amount of metal expected to be salvaged from this project. The Appeals Board notes the record does not establish that the metal was, in fact, sold. Mr. Markus was no longer living at the time of the regular hearing and his deposition was not taken prior to that time.

Projections made in Exhibit 12-A include measurements of the various items to be dismantled, calculations regarding the amount of salvage metal to result from dismantling those various items, and the dollar value per pound of the various metals. At least two of these factors are without adequate foundation in the record. The Appeals Board concludes that there is not adequate foundation in the record for either the measurements or the per pound dollar value of the salvage metal. Claimant testified on cross examination that no one made notes at the time measurements were taken. Although claimant testified that Mr. Markus agrees with the measurements shown in Exhibit 12-A that there is no corroborating testimony from Mr. Markus. It appears that the numbers were reconstructed from claimant's memory months later. The numbers are detailed numbers which one could not reasonably expect to remember. The Appeals Board therefore, finds there is inadequate foundation to support the measurements reflected in Exhibit 12-A. The Appeals Board also finds there is inadequate foundation to support the per pound dollar value used. The dollar value is derived from claimant's own testimony. However, the evidence does not indicate claimant had any special expertise regarding the salvage value of these metals. The Appeals Board therefore finds that Exhibit 12-A is without adequate foundation.

In addition, the Appeals Board notes testimony from Jaunita Markus, Mr. Markus' wife, undermines any claim that there would have been a \$10,000 payroll. She testified that she handled his checkbook. She testified that Mr. Markus never made more than \$50 per week from his salvaging operations including the years '89 and '90.

For the above foregoing reasons the Appeals Board concludes that the claimant was not an employee and the respondent did not have the \$10,000 payroll required for application for Kansas Workers Compensation Act. Claimant's application for benefits is, therefore, denied.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler dated February 28, 1996, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of August 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James Yates, Merriam, KS
Fred J. Logan, Prairie Village, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director